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MM 97-128  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

**MAY 24 1993**

In re Application of )

MARTIN W. HOFFMAN, )  
TRUSTEE )

For Renewal of License of )  
Station WHCT-TV, Hartford, Connecticut )

TO: The Commission

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

File No. BRCT-881201LG

APPLICATION FOR REVIEW

1. Pursuant to Section 1.115 of the Commission's Rules, Shurberg Broadcasting of Hartford ("SBH") hereby seeks review by the full Commission of an action taken by Marilyn J. McDermett, Associate Managing Director for Operations. That action is set out in a letter, dated April 23, 1993 and addressed to Martin W. Hoffman, Esq., from Ms. McDermett. A copy of that letter is included as Attachment A hereto. In that action Ms. McDermett denied a Petition to Dismiss filed by SBH with respect to the above-captioned application and granted a waiver of the hearing fee deadline established by the Commission in Proposals to Reform the Commission's Comparative Hearing Process to Expedite Resolution of Cases, 6 FCC Rcd 157 ("Comparative Hearing Reform"), recon. granted in part, 6 FCC Rcd 3403 (1991) ("Comparative Hearing Reform Reconsideration"). As set forth below, Ms. McDermett's action is a novel and unprecedented ruling which is unsupported by fact, law or logic and which is plainly in conflict with established Commission precedent and policy.

2. SBH is an applicant for authority to construct and

operate a new television station on Channel 18 in Hartford, Connecticut. The above-captioned application seeks renewal of the outstanding license of Station WHCT-TV, Hartford, which is authorized to operate on Channel 18. Since SBH's application is mutually exclusive with the above-captioned application, SBH is a party in interest here with standing to seek review of the action below.

### **Background**

3. In 1991 the Commission modified its hearing fee payment procedures to require applicants for commercial broadcast authorizations to pay their hearing fees significantly in advance of the hearing. Comparative Hearing Reform, supra. The primary goals of this modification were to "expedite the provision of new broadcast service to the public" and to conserve the Commission's resources. 6 FCC Rcd at 157, ¶3. The full Commission went to great lengths to put all broadcast licensees on notice that the new policy would apply to renewal applicants as well as applicants for new facilities:

We wish to emphasize that this hearing fee payment requirement also applies to renewal applicants that face a comparative challenge.

Comparative Hearing Reform Reconsideration, 6 FCC Rcd at 3403,

¶4. In a footnote to the quoted statement, the Commission made clear that

the date for fee payment established in the Public Notice of acceptance of the challenging application will also be the date on which the renewal applicant must pay its hearing fee. Where the challenging application was accepted for filing in a Public Notice released before July 1, 1991, Appendix A specifies the

method of hearing fee payment for both the renewal applicant and challenger.

Id. at 3409, n.2.

4. Appendix A to Comparative Hearing Reform

Reconsideration contained the following information:

**IF A COMMERCIAL APPLICANT HAS BEEN ACCEPTED FOR FILING IN A PUBLIC NOTICE RELEASED PRIOR TO JULY 1, 1991, APPLICANT MUST PAY ITS HEARING FEE ON JULY 15, 1991.**

**This hearing fee payment requirement also applies to *renewal applicants* where a public notice announcing the acceptance for filing of a competing application was released prior to July 1, 1991.**

\* \* \*

*Failure to make the hearing fee payment in a timely manner will result in the dismissal of the underlying pending application.*

6 FCC Rcd at 3408-3409 (all emphases -- italics, bold-facing and capitalizations -- in original). SBH's application -- which is mutually exclusive with the above-captioned renewal application -- was accepted for filing in a public notice issued in February, 1991. See Broadcast Application, Report No. 14926, Mimeo No. 11679, released February 8, 1991. Thus, the WHCT-TV renewal applicant was clearly required, by the express and unequivocal language quoted above, to pay its hearing fee by July 15, 1991.

5. Mr. Hoffman, who as Trustee in Bankruptcy for the former licensee is himself the renewal applicant, failed to tender his hearing fee by July 15, 1991. In fact, no such fee had been tendered even by August 2, 1991, on which date SBH moved to dismiss his application. It was not until August 9, 1991 that, apparently reacting to SBH's motion, Mr. Hoffman tendered his fee. In justification for his lateness all he could allege was his own ignorance of the fee requirement.

6. In response SBH noted that ignorance is not generally accepted as an excuse. This is especially so in view of the facts that:

- the Commission's public notice was so incredibly and emphatically explicit with respect to the fee requirement as it applies to renewal applicants.
- the former licensee had had expert communications counsel at all times prior to the conversion of its bankruptcy to a Chapter 7 liquidation (at which time Mr. Hoffman was appointed trustee), and the former licensee's creditors had retained separate, independent expert communications counsel, thus assuring that the parties directly interested in the licensee's bankruptcy estate knew or should have known of the fee policy; and
- Mr. Hoffman himself is an attorney who is presumably sensitive to the need to apprise oneself of, and comply with, relevant regulatory requirements such as the fee policy.

Additionally, SBH reminded the Commission that Station WHCT-TV had been off-the-air since Mr. Hoffman had assumed control of it in April, 1991, that Mr. Hoffman was not authorized by the Bankruptcy Court to recommence operation, and that the viewing public in Hartford was thus being deprived of service.

7. Nearly two years passed between the filing of SBH's petition to dismiss and Ms. McDermett's letter. As the Commission has been repeatedly advised, during that period Mr. Hoffman lost control of virtually all of the real and personal property associated with Station WHCT-TV when that property (which included, inter alia, the former licensee's real estate, studio building, studio equipment, transmitter, antenna, and apparently even the supporting tower) was foreclosed upon by a creditor with the concurrence of Mr. Hoffman. As a result, all

that remains in the estate held by Mr. Hoffman -- and all that has remained there for months -- are the station's license and a single leasehold interest of questionable (and arguably negligible practical) value.<sup>1/</sup> Thus, even if Mr. Hoffman were authorized to recommence operation of the station -- and he is not so authorized -- he would not be able to do so because he has no physical facilities with which to do so.

8. Notwithstanding all of these factors -- none of which supports a waiver of the fee requirement -- in her April 23, 1993 letter Ms. McDermett waived that requirement and denied SBH's petition to dismiss the above-captioned application.

#### Argument

9. Ms. McDermett relies on three general arguments in support of her decision. First, she asserts that denial of the waiver would "run[ ] directly counter to . . . distribution of the debtor's assets to the maximum benefit of creditors". Second, she asserts that the hearing fee requirement was somehow not really intended to be applied to renewal applicants because, supposedly, comparative renewal proceedings "do not involve the authorization of new service to the public". And third, she asserts that Mr. Hoffman "made a bona fide attempt to comply with

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<sup>1/</sup> The leasehold interest involves the station's presently authorized transmitter site. As the Commission has previously been advised, the lease is, by its own terms, terminable upon 90 days notice. SBH understands that such notice was given on or about April 21, 1993, which would mean that the lease would terminate on or about July 20, 1993, thus leaving the estate with absolutely nothing but the Commission license. SBH also understands that Mr. Hoffman may initiate (or may already have initiated) litigation aimed at retaining the leasehold interest in the bankruptcy estate in some fashion.

the Commission's regulations". None of these assertions has any merit whatsoever.

10. With respect to Mr. Hoffman's supposed interest in "distribution of the debtor's assets to the maximum benefit of creditors", the record is clear that the debtor's assets have already been distributed for the benefit of creditors: virtually all of the debtor's real and personal property has already been transferred. All that is left is the station's broadcast authorization (and whatever remains of the apparently-terminated leasehold). In other words, Mr. Hoffman has already accomplished his task of disposing of the debtor's assets independently of the station's license, and dismissal of his renewal application would not -- indeed, could not -- "run counter" to that effort. <sup>2/</sup>

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<sup>2/</sup> In her letter Ms. McDermett, citing LaRose v. FCC, 494 F.2d 1145, 1149-1150 (D.C. Cir. 1974), seems to treat the Commission-issued license as an independent "asset" of the debtor's estate. Such treatment is impermissible under the Communications Act and a long-line of Commission and court decisions which specifically, repeatedly and expressly hold that licenses (and other instruments of authorization) cannot be deemed to be property or assets. E.g., 47 U.S.C. §§301, 307(h); Donald L. Horton, 11 R.R.2d 417 (1967); Bonanza Broadcasting Corp., 11 R.R.2d 1072 (1967); Radio Station KDAN, Inc., 12 R.R.2d 584 (1968); Edward B. Mulrooney, 13 R.R.2d 1028 (1968); E. Al Robinson, 33 R.R.2d 593 (1975); Omega Cellular Partners, 5 FCC Rcd 7624 (Mobile Services Division 1990); In re D. H. Overmyer Telecasting Co., 35 Bankr. 400 (Bankr. Ct. N.D. Ohio 1983) (An "FCC license is not 'property of the estate', as commonly defined"). To the extremely limited extent that that well-established principle may have been modified at all in recent years, such modification occurred in the non-broadcast area; indeed, Chairman (then-Commissioner) Quello, joining in a separate opinion of Commissioner Dennis, has gone out of his way specifically to note that such actions should not be interpreted as affecting broadcast authorizations. See Bill Welch, 3 FCC Rcd 6502, 6506 (1988) (Dennis and Quello, Commissioners, concurring).

LaRose, cited by Ms. McDermett, did not in any way alter the statutorily-established premise that a bare license does not and cannot constitute "property". The reference to a license as an "asset" in that case appears to be, at best, dictum which, read in context, seems to refer not to the actual Commission-issued authorization, but rather to the station's on-going business which is conducted pursuant to that

(continued...)

Ms. McDermett's first point, therefore, is simply incorrect as a matter of fact and law.

11. Similarly, her second assertion has no factual or legal support. As a matter of law, her claim that the imposition of the fee requirement on renewal applicants was something of an afterthought which could be readily waived is not supported by any authority whatsoever. To the contrary, when the Commission announced that imposition, it took great pains to make clear to renewal applicants that, in fact, they were subject to the fee requirement. As indicated in the materials quoted above in Paragraph 4, that particular provision was highlighted in its own separate, bold-faced, italicized sentence. The penalty for failure to timely file (i.e., immediate dismissal) was similarly emphasized without any indicated exception for renewal applicants. In view of these incredibly plain statements of policy by the Commission itself, it is surprising that Ms. McDermett, acting pursuant to delegated authority, should attempt to reduce that policy to a nullity.

12. In justification for her position, Ms. McDermett claims that the fee requirements were intended to encourage settlements in order to expedite the initiation of new service. From this Ms. McDermett concludes that comparative renewal

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<sup>2/</sup> (...continued)  
authorization. In other words, the LaRose dictum seems to stand for the unexceptional proposition that the value of an on-going business is likely to be maximized if that business remains on-going. But that proposition has no relevance to this case, where Station WHCT-TV has been off-the-air for more than two years already, where there is therefore no on-going business, and where all of the station's real and personal assets have already been disposed of.

proceedings generally, and the WHCT-TV proceeding in particular, may be exempted because they do not involve the authorization of new service. Ms. McDermett notes in this regard that no Commission policy encourages renewal applicants to discontinue their "existing service to the public".

13. But Ms. McDermett's conclusion is not supported by the facts of this case. Here, Station WHCT-TV has been off-the-air for more than two years, and Mr. Hoffman is unable (because of lack of legal authority and lack of physical assets) to return it to the air. The public in Hartford has been deprived of service for more than two years, and the above-captioned application itself presents no possibility that the station could be returned to the air. Ms. McDermett's suggestion that Station WHCT-TV may provide some "existing service to the public" is thus factually wrong, and any "legal" conclusion which hinges on that suggestion is thus invalid. In reality, this situation is much more akin to, at most, a "new applicant proceeding", and the Commission's well-established interest in expediting, rather than delaying, provision of broadcast service <sup>3/</sup> weighs heavily

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<sup>3/</sup> E.g., Renewal Reporting Requirements for Full Power, Commercial AM, FM and TV Broadcast Stations, FCC 92-557, released December 30, 1992, at ¶¶5-6, where the Commission stated that

When a licensee discontinues operations for a long period of time, the public is harmed through diminished service. This harm is compounded when the licensee is unable or unwilling to restore service and permanently discontinues operations but does not provide that information to the Commission so that the frequency might be used by another party. Allowing such licensees to preserve their exclusive right to use the frequency precludes the provision of service to the public by another interested party that would resume station operations. It also hinders the Commission's maximum utilization of the  
(continued...)



here in support of dismissal of Mr. Hoffman's application. <sup>4/</sup>

14. Finally, Ms. McDermett's third ground -- that Mr. Hoffman had made a "bona fide attempt to comply with the Commission's regulations" -- is also mistaken. Contrary to Ms. McDermett's suggestion, Mr. Hoffman was, by his own admission, unaware of the fee requirement, despite the fact that the Commission had been crystal-clear in its announcement of that requirement. Not only had he not made any attempt, bona fide or otherwise, to comply with the requirement in a timely manner, he had apparently not even made any attempt to apprise himself of the existence of the requirement in the first place.

15. Such a lackadaisical approach to a licensee's responsibilities warrants censure, not leniency. This is especially true in view of the fact that Station WHCT-TV and its creditors have never lacked for expert communications counsel capable of protecting their interests. It is also true in view of the fact that Mr. Hoffman is himself an attorney who could and should have been sensitive to the need to inform himself of applicable regulatory requirements.

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<sup>3/</sup> (...continued)

electromagnetic spectrum in the public interest.

The Commission has historically regarded as paramount its role under the Communications Act to ensure that licensees broadcast in the public interest. . . . Unjustified prolonged suspension of station operations disserves the public interest. . . .

<sup>4/</sup> This is particularly so because, as discussed above, Mr. Hoffman has already disposed of the station's real and physical assets. Thus, dismissal of the renewal application will not interfere with his ability to dispose of the estate's assets for the benefit of creditors, as that disposition is already a fait accompli.

**Conclusion**

16. The unfortunate saga of Channel 18 in Hartford has dragged on for more than 12 years already. Ms. McDermett's action seems designed to extend that sad tale even more, despite the fact that dismissal of the above-captioned application could have led to the prompt grant of SBH's application and the prompt recommencement of service on Channel 18 by SBH. As indicated above, the Commission has recognized, as recently as December 30, 1992, that the public interest is disserved by stations which go dark for long periods but which still block utilization of their channels by new applicants. That is precisely what is happening (and what has been happening for at least the last two years) here. SBH submits that Ms. McDermett's action must be reversed, Mr. Hoffman's above-captioned application dismissed, and SBH's application granted immediately. No other action would be consistent with the public interest.

Respectfully submitted,

  
/s/ Harry F. Cole  
Harry F. Cole

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Counsel for Shurberg Broadcasting  
of Hartford

May 24, 1993

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

APR 23 1993

OFFICE OF  
MANAGING DIRECTOR

Martin W. Hoffman, Esq.  
363 Main Street  
Hartford, Connecticut 06106

Dear Mr. Hoffman:

This is in response to your request for acceptance of late filed hearing fee tendered on behalf of Astroline Communications Company Limited Partnership (Astroline), Debtor-in-Possession and renewal applicant for the license to WHCT-TV, Hartford, Connecticut.

By way of background, Astroline's renewal application is mutually exclusive with several applications for a construction permit for a new television station to operate on Channel 18, Hartford, Connecticut. One of these applicants, Shurberg Broadcasting of Hartford (Shurberg), filed pleadings in opposition to your request, and you responded to those pleadings.

Turning to the merits, you state that you are the Trustee in bankruptcy for Astroline in a Chapter 7 proceeding. You also state that the Commission has granted the assignment of the Debtor's broadcast station license to you. You further relate that, on or about August 2, 1991, the attorney for Shurberg contacted you and advised you that a hearing fee for the Debtor's renewal application was due to be paid by July 1, 1991. You contend that you had no knowledge or notice of this deadline, and that in the course of complying with other Commission regulations, no one advised you of the hearing fee filing deadline. You subsequently paid the fee.

Shurberg recites that a Commission rulemaking proceeding required pending mutually exclusive applicants, including renewal applicants, that had not been designated for hearing prior to July 1, 1991, to tender their hearing fees by July 15, 1991. Shurberg contends that it was the sole applicant to pay the hearing fee in a timely manner, and requests that the remaining applications, including Astroline's, be dismissed, and that its application be granted. In support of its opposition, Shurberg argues that counsel for Astroline was aware of the competing applications that were mutually exclusive with Astroline's renewal. Shurberg argues that Astroline cannot now rely on claims of ignorance of the July 15 hearing fee deadline.

Upon consideration of your request, we have concluded that you have shown good cause for waiver of the July 15, 1991 hearing fee deadline and that waiver in this instance would promote the public interest. See 47 C.F.R. § 1.1115(a). The Commission has in the past recognized that a bankruptcy Trustee representing a debtor

licensee before the Commission occupies a special or unique position before the agency. See, e.g., LaRose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974). While still subject to the Commission's rules and regulations, we realize that the bankruptcy Trustee nevertheless has a different mission, and that strict enforcement of our rules resulting in dismissal of the underlying license runs directly counter to his statutory role -- distribution of the debtor's assets to the maximum benefit of creditors -- especially since the license itself may be the most valuable asset the debtor holds in possession. Id. at 1149-50.

Moreover, the particular rule involved here was primarily adopted for a purpose that has little relevance to your role in the Hartford proceeding. The Commission adopted the requirement for early payment of hearing fees in its proceeding to expedite the comparative hearing procedures for new broadcast facilities. The proceeding was designed primarily to expedite the provision of new services to the public. The Commission thus stated that the intent of the rule was to expedite the comparative hearing process for new broadcast facilities "by [e]ncouraging more and/or earlier settlements." See Report and Order on Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157 (1991), recon. granted in part, 6 FCC Rcd 3403 (1991). Although the proceeding and rule were directed at new applicants and new applicant proceedings, the Commission, simply as a matter of fairness, decided to apply the requirement for early payment of hearing fees to all pending mutually exclusive applications, including renewals. Nevertheless, the main purpose of the rule, encouraging settlements by new applicants, especially in proceedings for new facilities, appears to have little bearing on renewal applicants. Comparative renewal proceedings do not involve the authorization of new service to the public, and the Commission has no general policy that encourages renewal applicants to enter into settlement agreements with challengers that result in the discontinuance of licensees' existing service to the public.

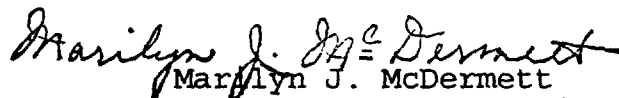
In addition, as you have indicated, you made a bona fide attempt to comply with the Commission's regulations, but you were unaware of the requirement for accelerated payment of the hearing fee by a date certain. However, you appear to have been concerned with submitting your fee in the most expeditious manner upon learning that it was past due, and your fee arrived shortly after the deadline. In sum, we believe that the public interest would not be furthered by stringent application of the rule to your situation; your role as Trustee for Astroline Communication Company Limited Partnership, Debtor-in-Possession, warrants waiver of the July 15, 1991 hearing fee deadline regarding the debtor's renewal application for the license to WHCT-TV, Hartford, Connecticut.

Martin W. Hoffman, Esq.

3.

Accordingly, the petition to dismiss the debtor's renewal application is denied and your request for waiver of the hearing fee deadline is granted.

Sincerely,

  
Marilyn J. McDermott  
Associate Managing Director  
for Operations

cc: Harry F. Cole, Counsel for Shurberg Broadcasting of Hartford

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of May, 1993, I caused copies of the foregoing "Application for Review" to be placed in the U.S. mail, first class postage prepaid, or hand delivered (as indicated below), addressed to the following:

The Honorable James H. Quello,  
Chairman  
Federal Communications Commission  
1919 M Street, N.W. - Room 802  
Washington, D.C. 20554  
(BY HAND)

The Honorable Andrew C. Barrett,  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W. - Room 844  
Washington, D.C. 20554  
(BY HAND)

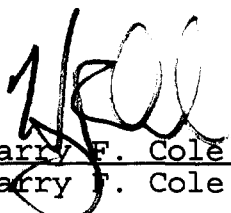
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Martin Hoffman, Esquire  
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Trustee-in-Bankruptcy for  
Astroline Communications Company  
Limited Partnership

  
/s/ Harry F. Cole  
Harry F. Cole